

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL D. LANG AND SUSAN LANG	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NO. 810804
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1988.	:	

Petitioners, Michael D. Lang and Susan Lang, 94 Gauguin Court, Middle Island, New York 11953-2002, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1988.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on October 27, 1992 at 1:15 P.M. Petitioner Michael D. Lang appeared pro se and on behalf of his wife, petitioner Susan Lang. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence Newman, Esq., of counsel).

ISSUE

- I. Whether petitioners' wage income was subject to New York State personal income tax.
- II. Whether the Division's imposition of penalty under Tax Law § 685(q) for the filing of a frivolous tax return was proper.

FINDINGS OF FACT

On April 23, 1990, the Division of Taxation ("Division") issued to petitioners, Michael D. Lang and Susan Lang, a Notice of Deficiency which asserted \$831.00 in additional personal income tax due, plus interest and penalties, for the year 1988.

Petitioners, husband and wife, timely filed a joint New York State Resident Income Tax Return (Form IT-201) for the year 1988. On Line 1 of said return ("Wages, salaries, tips, etc.") petitioners wrote "Non-privileged [sic] non-taxable" and "0" in the space available for

reporting the amount of such wages. Petitioners reported zero tax due on the return and claimed a refund of \$1,356.00 which amount equalled New York State income tax withheld by petitioners' employers during 1988 as indicated by wage and tax statements (Form W-2) attached to the return. These W-2's also indicated total wage income for petitioners of \$44,531.91.

By a Statement of Proposed Audit Changes dated March 12, 1990 the Division advised petitioners of the proposed income tax assessment of \$831.00 and the computation thereof and also advised of the Division's assertion of negligence penalties pursuant to Tax Law § 685(a)(1) and (2) and a penalty for the filing of a frivolous tax return pursuant to Tax Law § 685(q).

Petitioner Michael D. Lang was born in Queens, New York. Petitioner Susan Lang was born in Huntington, New York. During 1988, petitioner Michael D. Lang was employed by Cortronics Corporation and MFM Technology, Inc., both located in Ronkonkoma, New York. Petitioner Susan Lang was employed by National Health Laboratories, Inc. in Plainview, New York in 1988. During 1988, petitioners lived at their current address in Middle Island, New York.

SUMMARY OF PETITIONERS' POSITION

Petitioners' argument that their wage income was not subject to New York State personal income tax runs as follows: Petitioners were born in New York State and were therefore citizens of New York State. New York State is a sovereign nation. Petitioners therefore were not born in the United States and were not citizens of the United States. Nor were petitioners resident aliens of New York State. Petitioners' wage income was therefore not subject to Federal income taxes and was not part of petitioners' Federal adjusted gross income. Since, under Tax Law § 612(a), Federal adjusted gross income is, with certain modifications, New York adjusted gross income, petitioners' wage income was not includable in petitioners' New York adjusted gross income and was therefore not subject to New York personal income tax.

CONCLUSIONS OF LAW

A. Petitioners' position is, of course, without merit. To indulge petitioners very briefly, the "argument" may be refuted simply by noting that New York State is part of the United States of America and that petitioners, having been born in the United States, are citizens of the United States (US Const, 14th Amend, § 1; 8 USC § 1401[a]; Treas Reg § 1.1-1[a], [c]). Petitioners' wage income was properly subject to both Federal and New York State personal income tax (IRC § 1; Treas Reg § 1.1-1[a], [b]; Tax Law §§ 601, 611, 612).

B. Tax Law § 685(q) provides for the imposition of penalty for the filing of a frivolous tax return as follows:

"Frivolous tax returns.--If any individual files what purports to be a return of any tax imposed by this article but which does not contain information on which the substantial correctness of the self-assessment may be judged, or contains information that on its face indicates that the self-assessment is substantially incorrect; and such conduct is due to a position which is frivolous, or an intent (which appears on the purported return) to delay or impede the administration of this article, then such individual shall pay a penalty not exceeding five hundred dollars. This penalty shall be in addition to any other penalty provided by law."

C. The statute does not define "frivolous". Federal courts have interpreted this term for purposes of the frivolous income tax return penalty contained in the Internal Revenue Code (IRC § 6702) as "a position taken in a tax return...[having] no basis in fact or law" (Bradley v. U.S., 817 F2d 1400, 87-1 US Tax Cas ¶ 9336). Additionally, the regulations of the Tax Appeals Tribunal list the following examples of frivolous positions in the context of the Tribunal's frivolous petition penalty:

"(a) that wages are not taxable as income;

"(b) that petitioner is not liable for income tax because petitioner has not exercised any privileges of government;

"(c) that the income tax system is based on voluntary compliance and petitioner therefore need not file a return;

"(d) that federal reserve notes are not 'legal tender' or 'dollars' and petitioner therefore cannot measure his or her income; and

"(e) that only states can be billed and taxed directly." (20 NYCRR 3000.15.)

It is further noted that the Federal courts have held that good faith is irrelevant in determining whether the frivolous return penalty should apply (see, Cazedessus v. U.S. 84-2 US Tax Cas ¶

9561 [D Col]).

D. Here, petitioners' 1988 return listed wages, salaries and tips to be zero, even though petitioners received substantial wage income as reflected on their 1988 W-2 forms which were attached to the return. The return reported zero tax due and claimed a refund of tax withheld. The return thus contained information on its face which indicated that petitioners' self-assessment was substantially incorrect. Additionally, petitioners' conduct in filing their return was due to a frivolous position, i.e., their contention that they are not U.S. citizens and that therefore their wages are not subject to Federal income tax. This is obviously a position without basis in fact or law. The Division's imposition of penalty pursuant to Tax Law § 685(q) was therefore proper.

E. It is further noted that the record contains no evidence of reasonable cause such as would warrant abatement of penalty imposed herein under Tax Law § 685(b)(1) and (2).

F. The petition of Michael D. Lang and Susan Lang is in all respects denied and the Notice of Deficiency, dated April 23, 1990, is sustained.

DATED: Troy, New York
March 4, 1993

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE